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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-160

HARRY HAMMONDS,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Statement of the Case

The Defendant was arrested on January 30, 1973, for possession of marijuana. A timely motion was heard before the Honorable Paul R. Kramer, J.C.C. at Mount Holly, Burlington County, on March 6, 1974 and denied on March 18, 1974. Both the Defendant and the Prosecu-

tor had stipulated the testimony of the Trooper on the motion to suppress would constitute the State's case. The Defendant offered no additional testimony and was found guilty. He was sentenced to serve one year in the Burlington County jail, the service of which was stayed pending his appeal from the denial of the motion to suppress evidence, which was affirmed per curiam by the Appellate Division on March 19, 1975. A petition for a writ of certification was denied on June 12, 1975 by the Supreme Court. This petition is for a writ of certiorari on the motion to suppress evidence.

Jurisdiction

The final order of the New Jersey Supreme Court was made and entered on June 12, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3).

Question Presented for Review

Did the Defendant validly consent to the warrantless search of his trunk, thereby waiving his rights under the Fourth Amendment?

Statement of Facts

On January 30, 1973, at approximately 3:30 P.M., the petitioner was operating his vehicle in the Northbound lane of the New Jersey Turnpike at Mansfield Township. There were no other passengers in the vehicle. The petitioner was aware that his trunk was stuffed with approximately 100 pounds of marijuana, and his personal clothing. Neither was in plain view.

Trooper Joseph Pitko stopped the Petitioner for allegedly exceeding the speed limit and the petitioner pulled to the side of the road. The following exchange took place:

> "I stopped behind him and I approached the vehicle. I asked the driver for his license and registration, at which time he went through his wallet to obtain the driver's license and registration.
>
> At the time he was getting his license and registration he looked a little nervous and he started to shake visible to me.
>
> He got his license and registration. He handed it to me.
>
> I advised him that I stopped him for exceeding the speed limit and I asked him why his vehicle was sitting low in the rear. I said 'What are you carrying in the vehicle in the trunk?' He hesitated and he said, 'Clothes.'
>
> So I asked him, 'Do you mind if I take a look,' and he was still shaking. As a matter of fact, he even started to sweat a little bit on the forehead.
>
> Like I stated, I asked him, 'Do you mind if I take a look?' He hesitated and he said, 'I don't have the key.' So I asked him, 'Does the key to the ignition open the trunk, at which point he took out the key.
>
> We walked to the back of the vehicle and he placed the key into the trunk and he turned it. It didn't open. So I said, 'How about the other key?' —there were two keys on the ring. He placed that key in the trunk and he turned it and it opened it." (March 4, T4-6, T5-6).

At this time the Trooper observed three white cloth sacks containing green vegetation that appeared to be marijuana and placed the Defendant under arrest. The search of the trunk was without a warrant. There was no assertion of probable cause, nor did the Trooper claim that he was searching for weapons.

Argument for Granting the Writ

This petition raises substantial and important questions concerning the administration of criminal justice. This Court has stated that warrantless searches are per se unreasonable except in certain exceptional circumstances, such as where there is consent. *Katz* v. *United States,* 389 U. S. 347 (1967). Criteria for ascertaining consent has not been definitively set forth. Given the great danger of abuse by the police where they have not obtained a search warrant, it is incumbent that this Court address itself to the issue of the waiver of Fourth Amendment rights as it has done with the waiver of Fifth and Sixth Amendment rights. *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

The Defendant in the case at bar was stopped by a New Jersey State Trooper for speeding. The Defendant, a resident of Texas, was aware that he was carrying 100 pounds of marijuana in the trunk of his car. When the Trooper asked the Defendant what he was carrying he replied, "Clothes." When the Trooper asked him, "Do you mind if I take a look?", the petitioner falsely answered, "I don't have the key." The Trooper asked Petitioner to try "the other key" on the ring. The trunk was then opened.

In *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), the Court said, "A waiver is ordinarily a relinquishing of a know

right." At no time did the Trooper warn the Defendant that he had the right to refuse to consent to the search. Nor is there any evidence on the record that the Defendant indeed know that he had the right to refuse the Trooper entry to the trunk. The only basis the trial court found for imputing knowledge to the Defendant of his rights came at the very end of Judge Kramer's opinion:

> "I further find it difficult to believe that a young man of this very obvious intelligence, from the manner in which he testified, the son of an attorney in his area, with this much (three semesters college), on a trip of that nature involving that much money did not in fact know of his constitutional right not to have the car searched against his will."

This is idle speculation. Three semesters of college is hardly a law school education. The fact that he is the son of an attorney is irrelevant, since a person cannot be expected to master the esoterics of the law simply on the basis of having a father who is trained in the law. Nor is it likely that the Defendant asked his father for legal counsel before committing the illegal act. Certainly, there is no testimony to that effect.

More significantly, though, the very question of whether the Defendant, under the law, could refuse to allow the Trooper to search the trunk was in doubt in the trial Judge's own mind.

> "I would like to direct your thinking, gentlemen, on two lines: Number One, is this United States Supreme Court case as sweeping as the newspapers and other periodicals say it is where you can search the person, an individual with a motor

> vehicle offense. I think if we agree that the case really says that when we read it in its entirety, then I see little difficulty in extending it to a search of the immediate area particularly out on the Turnpike where Troopers do get shot at and have to concern themselves for their own safety." (March 4, T19)

If Judge Kramer is uncertain as to the rights in this matter, how can the Defendant be said to have knowledge of whether he had the right to refuse a gun-toting Trooper, who stops him for a traffic offense, entry into the trunk of his car?

The position of the petitioner is straightforward. For there to be meaningful consent, the Defendant must have known that he had the choice of refusing to allow the Trooper to search the car. After all, a person cannot be said to knowingly and voluntarily assent to a search when he does not know that he has the right to refuse.

The Petitioner's argument is supported by the caselaw in the area. In determining whether there was a valid consent to an otherwise unauthorized search, the Ninth Circuit Court of Appeals advised the following test:

> ". . . (T)he trial court determination that there has been an effective waiver cannot stand unless there is implicit therein a finding of fact that, under the described circumstances, the words used by Smith reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) Smith knew may be freely and effectively withheld." *Schoepflin* v. *United States,* 391 F. 2d 390, 398 (1968). See also *United States* v. *Blalock,* 255 F. Supp. 268 (1966).

And in *Wren* v. *United States,* 352 F. 2d 617, at 618, the Court announced similar requirements:

> "In order to constitute a voluntary consent it must appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved. In addition, such person must be cognizant of his rights in the premises, the consent must not be contaminated by duress or coercion and the government has the burden of proof. . . ."

Should this Court find that knowledge is not a necessary element of informed consent, it has long been established that there is no consent unless it is "free and voluntary and not a mere acquiescence to authority." *Bumper* v. *North Carolina,* 391 U. S. 543 (1968). See also, *Wren* v. *United States,* supra. Implicit in the very nature of the term "consent" is the requirement of voluntariness. To be voluntary the consent must be "unequivocal and specific" and "freely and intelligently given." *Judd* v. *United States,* 190 F. 2d 649, 651 (1951). The burden to make such a showing by clear and convincing testimony is on the state. *Wren* v. *United States,* supra, *State* v. *King,* 44 N. J. 346, 352 (1965).

The leading case on this question in New Jersey is *State* v. *King,* supra. The Court enumerates the following factors tending to establish voluntary consent:

1. Consent was given when the accused had reason to believe that the police would find no contraband.

2. Defendant admitted guilt before consent.

3. Defendant affirmatively assisted the police.

None of these factors is present in the instant case.

1. Petitioner knew the contraband was in the trunk (March 4, T7-22, 24);

> "Q. Were you aware that time that your vehicle, that the truck contained contraband? A. Yes."

2. Petitioner denied the trunk contained contraband before the search (March 4, T4-16 to 18).

> "'What are you carrying in the vehicle in the trunk?' He hesitated and he said, 'Clothes.'"

3. Petitioner made positive effort to stop the search by denying he possessed a key (March 4, T4-22 to 24);

> "Like I stated, I asked him, 'Do you mind if I take a look?' He hesitated and he said, 'I don't have the key.'"

It was only on the demand of the Trooper that the Defendant tried the key that was in the ignition, knowing full-well that it would not open the trunk. And it was only because the Trooper pursued the matter when he said, "How about the other key," that the Petitioner got the key which opened the trunk.

It is apparent that if the Petitioner was freely and voluntarily consenting to said search and not merely acquiescing to authority, he would have gotten the correct key to begin with rather than deny he had the key with him, and then try the wrong one before he finally opened the trunk at the Trooper's prodding.

The Court in *King* goes on to list those factors which tend to show coercion:

1. Consent was made by an individual already arrested.
2. Consent was obtained despite a denial of guilt.

3. Consent was made only after accused had refused initial requests for consent to search.

4. Consent was given when subsequent search resulted in a seizure of contraband the accused must have known would be discovered.

5. Consent was given when the defendant was handcuffed.

In the instant case, (1) the defendant was stopped for speeding; (2) he denied he was carrying any contraband when questioned by the Trooper; (3) he refused the Trooper's request to search by denying he possessed a key; (4) the trunk was stuffed with overflowing sacks of smelly vegetation which could not have been overlooked (March 4, T5-7 to 12 and T12-14 to 16), but Defendant was not handcuffed until immediately after the trunk was opened.

Furthermore, it is admitted by the Trooper in testimony that the Petitioner appeared "nervous", "sweating", "shaking visibly" (March 4, T4). As the accused stated, he was under "the impression that if I did not open the trunk of the car I was dead" (March 4, T13-2 to 3).

The trial court had relied upon *Scheckloth* v. *Bustamonte,* 412 U. S. 218 (1973). *Schneckloth* is inapposite since in that case the officer asked the owner if he could search the car and the owner replied, "Sure, go ahead." That is hardly the case here.

The aforementioned facts make up a clear picture that the accused did not freely and intelligently consent to a search of his trunk. Nowhere is there evidence that the petitioner agreed to the search. Rather, his nervous behavior and denial that he had the key manifests his intention to thwart the search. It was only through the persistence of the Trooper's demands that the accused finally acquiesced.

In light of the Court's strong presumption against waiver of constitutional rights when Fifth and Sixth Amendment rights are involved, and its requirement that a suspect be informed of his rights before he can consent to a waiver, *Miranda* v. *Arizona*, supra, we can see no reason for treating the relinquishment of Fourth Amendment rights in a different manner.

Given the inherent power of a gun-carrying Trooper vis-a-vis a suspect, petitioner believes that a police officer should be required to warn a suspect of his rights under the Fourth Amendment before a waiver can ensue. Not only would this make consent knowledgeable, but it would ensure that any subsequent waiver was voluntary rather than the natural result of a police officer's power in such situations. This policy would also clear up the ambiguities that have resulted in cases involving alleged consent.

Thus, in *United States* v. *Blalock*, supra, one of the agents asked the defendant whether, since he claimed he was not involved in the robbery, he would mind if they searched his room. Defendant replied that he had no objection. It was during the search that the incriminating evidence was found.

The Court, in granting defendant's motion to suppress, stated, "The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd."

In the case at bar, the defendant was never informed of his rights, nor is there any evidence that he knew what

his rights were. Unlike *Blalock*, there was nothing voluntary about his consent. For the reasons stated, the denial of the motion to suppress should be reversed.

CONCLUSION

It is urged that there were no grounds for the search of the petitioner's vehicle and his motion to suppress should have been granted.

Respectfully submitted,

MICHAEL GROSS,
Attorney for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—March 19, 1975.)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-3107-73

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

HARRY HAMMONDS,

Defendant-Appellant.

Submitted March 10, 1975—Decided March 19, 1975.

Before Judges LEONARD, SEIDMAN and BISCHOFF.

On appeal from Superior Court, Law Division, Burlington County.

Mr. Michael Gross, attorney for appellant.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent (Mr. Solomon Rosengarten, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Appendix A

We affirm the order denying defendant's motion to suppress evidence essentially for the reasons stated by Judge Kramer in his oral opinion.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Petition for Certification

(Filed—June 12, 1975)

SUPREME COURT OF NEW JERSEY
C-555 SEPTEMBER TERM 1974

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

HARRY HAMMONDS,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 12th day of June, 1975.

FLORENCE R. PESHOE
Clerk

APPENDIX C

Oral Opinion of Judge Kramer

SUPERIOR COURT, NEW JERSEY, LAW DIVISION,
BURLINGTON COUNTY

THE STATE OF NEW JERSEY

Plaintiff,

vs.

HARRY HAMMONDS,

Defendant.

Mr. Sullivan: Your Honor, can I make a recital for the record?

The Court: Surely.

Mr. Sullivan: Your Honor, this is the case of the State of New Jersey versus Harry Hammonds, Indictment number 481-72, charging possession of and possession with the intent to distribute marijuana. Your Honor heard a motion to suppress on March 6, 1974, wherein the State presented the testimony of the arresting officer, Trooper Pitko, as to the circumstances of the arrest, and the defense presented the testimony of the Defendant, Harry Hammonds, Jr., with regard to the defense version of the facts. Your Honor reserved decision in order to inquire into the legal background of the case, and at this time I believe your Honor intends to announce the decision.

Appendix C

The Court: Anything further?

Mr. Queenan: No. I have nothing further.

The Court: Well, gentlemen, I'm glad that we reserved decision on the matter so that I could have your additional help by way of a further letter memorandum on the authorities.

The fact of the matter is that since we argued the case there has been brought to my attention the case of *Schneckloth* v. *Bustamonte*, a United States Supreme Court decision, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854, that case decided in 1973, the opinion by Justice Stewart. Gentlemen, it answers flatly and unequivocally the argument as to whether or not for a consentual search, where the police officer asks the driver of the car, the owner or the operator of the car, if he may search the car, whether or not the police officer must give a Fourth Amendment warning analogous to a First Amendment Miranda Warning. This very recent United States Supreme Court case says the officer does not have to give that warning.

The very applicable quote from the *Schneckloth* decision is: "Our decision today is a narrow one. We hold only that when a subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

This is, if anything, an extension of our own Supreme Court decision, *State* v. *King,* which is 44 N. J. 346. There the Appellate Division had reversed the trial court and held that in that case, because of the trial court's ability to observe the witnesses, that it was in a better position to establish voluntariness from all of the facts than an upper court with a cold record. Now, the facts in that case were quite a bit more extreme than this. In that case the defendant was accused of armed robbery. They went to his apartment in the middle of the night or around midnight, got him out of the apartment, took him on his way to the police station, one police officer in the front, one police officer in the back; and according to the police they asked him on the way to the station if they could search the apartment. He said, "All right," and they turned around and went back and searched the apartment thereafter.

Now, the facts in the *Schneckloth* case are more analogous to our case. There the police officer stops in Sunnyvale, California, a car at 2:40 in the morning because of a motor vehicle violation. One of the six men in the car seated in the back seat, told the officer it was his brother's car after no one else was able to furnish driver's license or any identification. Supposedly the officer asked Alcala—that is the man in the back who was the brother of the car owner—if he could search the car. Alcala replied, "Sure, go ahead."

All right. Gentlemen, I must respectfully deny the motion to suppress. I find as fact the following: That it was 3:30 in the afternoon on January 30, 1973; that the Defendant was travelling northbound on the New Jersey Turnpike; the officer's testimony, which I find to be credible, was that the Defendant was visibly nervous when

asked to produce his license and registration; that his hands were shaking; that the vehicle was low in the rear and that the officer commented about that to the man. Apparently there was no question about this, because the Defendant, himself, said, when the police officer asked, "Why is your car riding low in the rear?" the Defendant said, "There's no reason for it to be riding low."

I find that the trooper ordered the Defendant from the vehicle, but I do not find that he was in custody or under arrest at the time. I find that there was a detainer, certainly, at that time, but it had not risen to the level of an arrest, a custody situation. More specifically, I find that this police officer did put the words in the form of a question; that he did say, "Do you mind if I take a look?" or something to that effect.

I find that the Defendant said that he had no key. I find that the police officer did say, "Try your ignition key"; that the Defendant tried it and it didn't work; that the police officer then suggested that he try the other key, and the trunk did open, at which time the police officer saw the packets of marijuana amounting to some hundred or hundred twenty-five pounds or thereabouts.

I find that the Defendant is 29 years of age with some college, some three semesters of college; he was on his way from Texas to New York and Vermont with this large quantity of marijuana. I find that it was a voluntary search, based on the finding that I've already announced. I further find it difficult to believe that a young man of this very obvious intelligence, from the manner in which he testified, the son on an attorney in his area, with this much college, on a trip of that nature involving that much money in contraband, did not in fact know of his consti-

tutional right not to have the car searched against his will.

So, for those reasons, gentlemen, I must deny the motion in this case.